Supreme Court, U.S.
FILED
DEC 19 2007
OFFICE OF THE CLERK

No. 1

07-832

IN THE

Supreme Court of the United States

ALFRED J. KOONIN,
Petitioner,

–against–

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

NATHAN Z. DERSHOWITZ*
AMY ADELSON
DERSHOWITZ, EIGER
& ADELSON, P.C.
220 Fifth Avenue
Suite 300
New York, NY 10001
(212) 889-4009
* COUNSEL OF RECORD

DANIELA KLARE ELLIOTT
Of Counsel

Attorneys for Petitioner
ALFRED J. KOONIN

QUESTIONS PRESENTED FOR REVIEW

1. Whether an indictment, brought under the five-year general statute of limitations set forth at 18 U.S.C. § 3282, is time-barred if it does not allege that an overt act occurred within the five years preceding its filing, as the First, Sixth and Tenth Circuits have held; or whether the Ninth and Eleventh Circuits are correct in holding that the indictment is timely if it alleges an overt act occurred within five years and one day preceding its filing.

2. Whether defendants, who had direct appeals pending when this Court decided United States v. Booker, 543 U.S. 220 (2005), are entitled to be resentenced under the 18 U.S.C. §3553(a)-guided considerations mandated by Booker and the procedure of "individualized" review articulated in Rita v. United States, 127 S. Ct. 2456 (2007) and Gall v. United States, ___S. Ct. ___ (Slip. Op. December 10, 2007).

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 8

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT IN THE CIRCUITS OVER HOW PROPERLY TO CALCULATE THE STATUTE OF LIMITATIONS SET FORTH AT 18 U.S.C. § 3282(a) 8

A. Circuits Following Grunewald 10

B. Circuits In Conflict 11

1. The Second Circuit 11

2. The Fifth Circuit 13

C. Circuits Ignoring Grunewald 14

III. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE APPROPRIATE PROCEDURE FOR RESENTENCING DEFENDANTS WHOSE CASES WERE ON DIRECT APPEAL WHEN BOOKER WAS DECIDED, AND ALSO TO RESOLVE A CONFLICT IN THE CIRCUITS OVER WHAT STANDARD DISTRICT COURTS SHOULD APPLY IN THOSE RESENTENCINGS 17

A. Circuits In Conflict 18

B. Plain Error Is An Unfair Standard 21

CONCLUSION 27

APPENDIX

Decision of the Court of Appeals for the Ninth Circuit dated March 25, 2004 ..... App. 1

Memorandum of the Court of Appeals for the Ninth Circuit dated March 25, 2004 ..... App. 11

Order denying Petition for Rehearing and Rehearing En Banc dated August 31, 2004 ..... App. 15

Decision of the United States Supreme Court granting certiorari, dated March 28, 2005 ..... App. 17

Order of the Ninth Circuit remanding to District Court for consideration of sentence under United States v. Ameline, dated October 3, 2005 ..... App. 18

Judgment of the Ninth Circuit remanding to District Court for consideration of sentence under United States v. Ameline, dated October 3, 2005 ..... App. 19

Excerpt from District Court status hearing on December 5, 2005, reaffirming sentence previously imposed ..... App. 21

Minutes of District Court affirming sentence previously imposed, dated December 6, 2005 ..... App. 23

Decision of the Court of Appeals for the Ninth Circuit dated July 9, 2007 .. App. 24

Order of the Court of Appeals for
the Ninth Circuit denying Petition
for Rehearing, Petition for Rehearing
En Banc and Petition to File
Amendment to Recall of Mandate,
dated September 14, 2007 ..... App. 26

TABLE OF AUTHORITIES

CASES

Apprendi v. New Jersey,
530 U.S. 466 (2000) 22

Bergschneider v. Denver,
446 F.2d 569 (9th Cir. 1971) 15

Blakely v. Washington,
542 U.S. 296 (2004) 22

Burnet v. Willingham Loan & Trust Co.,
282 U.S. 437 (1931) 12, 15

Gall v. United States,
___ S. Ct. ___, 2007 WL 4292116 (Slip Op.,
December 10, 2007) ..... passim

Grunewald v. United States,
353 U.S. 391 (1957) ..... passim

Johnson v. United States,
520 U.S. 461 (1997) 22

Kimbrough v. United States,
___ S. Ct. ___, 2007 WL 4292040 (Slip Op.,
December 10, 2007) 25

Krulewitch v. United States,
336 U.S. 440 (1949) 16

Lambert v. Conrad,
308 F.2d 571 (9th Cir. 1971) 15

Rita v. United States,
127 S. Ct. 2456 (2007) ..... passim

Toussie v. United States,
397 U.S. 112 (1970) 15

United States v. Ameline,
409 F.3d 1073 (9th Cir. 2005) ..... passim

United States v. Antonokopolous,
399 F.3d 68 (1st Cir. 2005) 20

United States v. Barnett,
398 F.3d 516 (6th Cir),
cert. dismissed, 454 U.S. 163 (2005) 21, 23

United States v. Bethea,
672 F.2d 407 (5th Cir. 1982) 13

United States v. Booker,
543 U.S. 220 (2005) ..... passim

United States v. Brasco,
516 F.2d 816 (2d Cir.),
cert. denied, 423 U.S. 860 (1975) 11

United States v. Brown,
332 F.3d 363 (6th Cir. 2003) 10

United States v. Butler,
792 F.2d 1528 (11th Cir.), cert. denied,
479 U.S. 933 (1986) 14

United States v. Charnay,
537 F.2d 341 (9th Cir. 1976) 15

United States v. Coles,
403 F.3d 764 (D.C. Cir.),
cert. denied, 546 U.S. 828 (2005) 19, 30

United States v. Crosby,
397 F.3d 103 (2d Cir. 2005) 19

United States v. Davis,
533 F.2d 921 (5th Cir.),
cert. denied, 429 U.S. 1000 (1976) 13, 14

United States v. Fletcher,
928 F.2d 495 (2d Cir.),
cert. denied, 502 U.S. 815 (1991) 11

United States v. Fitzpatrick,
892 F.2d 162 (1st Cir. 1989) 10

United States v. Gonzalez-Huerta,
403 F.3d 727 (10th Cir.) (Briscoe, J., dissenting),
cert. denied, 546 U.S. 967 (2005) 23

United States v. Guerro,
694 F.2d 898 (2d Cir. 1982),
cert. denied, 459 U.S. 1222 (1983) 12, 14

United States v. Guevara,
277 F.3d 111 (2d Cir. 2001) 22

United States v. Hitt,
249 F.3d 1010 (D.C. Cir. 2001) 14

United States v. Hughes,
401 F.3d 540 (4th Cir. 2005) 20

United States v. Jimenez Recio,
537 U.S. 270 (2003) ..... passim

United States v. Lash,
937 F.2d 1077 (6th Cir),
cert. denied, 502 U.S. 949 (1991) 10

United States v. Mann,
161 F.3d 840 (5th Cir. 1989),
cert. denied, 526 U.S. 1117 (1999) 13

United States v. Mares,
402 F.3d 511 (5th Cir. 2005) 20

United States v. McBride,
434 F.3d 470 (6th Cir. 2006) 18

United States v. Olano,
507 U.S. 725 (1993) 23

United States v. Oliver,
397 F.3d 369 (6th Cir. 2005) 21

United States v. Paladino,
401 F.3d 471 (7th Cir.),
cert. denied, 546 U.S. 849 (2005) 19

United States v. Pinto,
838 F.2d 426 (10th Cir. 1988) 10

United States v. Pirani,
406 F.3d 543 (8th Cir.),
cert. denied, 546 U.S. 909 (2005) 20, 23

United States v. Portner,
462 F.2d 678 (2d Cir),
cert. denied, 409 U.S. 983 (1972) 11

United States. V. Qayyum,
451 F.3d 1214 (10th Cir. 2006) 11

United States v. Rodriguez,
398 F.3d 1292 (11th Cir. 2005),
cert. denied, 545 U.S. 1127 ( ) 19

United States v. Salmonese,
352 F.3d 608 (2d Cir. 2003) 8

United States v. Tawab,
984 F.2d 1533 (9th Cir. 1993) 15

United States v. Thompson,
422 F.3d 1285 (11th Cir.) (Tjoflat, J.,
specially concurring),
cert. denied, 127 S. Ct. 1285 (2005) 20

United States v. White,
405 F.3d 208 (4th Cir.),
cert. denied, 546 U.S. 1023 (2005) 21

Wiggins v. United States,
64 F.2d 950 (9th Cir),
cert. denied, 290 U.S. 657 (1933) 15

CONSTITUTION, STATUTES AND RULES

U.S. Const.,
Amend. V 2
Amend. VI 2, 23

18 U.S.C.,
§ 3282 ..... passim
§ 3553(a) ..... passim

Federal Rules of Criminal Procedure,
Rule 45 ..... 12, 13
Rule 52 21

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is partially reported at 361 F.3d 1250 (9th Cir. 2004), and is set forth at App. 1. The unpublished portion of the opinion is set forth at App. 11. The order denying petitioner's petition for rehearing and rehearing en banc is not reported, and is set forth at App. 15. The decision of this Court dated March 25, 2005, granting certiorari and vacating the judgment and remanding the case to the United States Court of Appeals for the Ninth Circuit for further consideration in light of United States v. Booker, 543 U.S. 220 (2005), is reported at 544 U.S. 945 (2005) and is set forth at App. 17. The Ninth Circuit's October 3, 2005, Order and Judgment, remanding the case to the district court for consideration of sentence under United States v. Ameline, 409 F.3d 1073 (9th Cir. 2005), is unreported and is set forth at App. 18-19. The district court's oral ruling, on December 5, 2005, affirming its previously imposed sentence, is at App. 21 and the corresponding minutes are set forth at App. 23. The Ninth Circuit's unreported affirmance, dated July 9, 2007, is at App. 24. That Court's Order denying a petition for rehearing and rehearing en banc was entered on September 14, 2007, and is set forth at App. 26.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 25, 2004. (App. 1) Petitioner's timely filed petition for rehearing and for rehearing en banc was denied on August 31, 2004. (App. 15) After remand from this Court, the decision of the Ninth Circuit Court of Appeals was entered on July 9, 2007. (App. 25) Petitioner's timely filed petition for

rehearing and for rehearing en banc was denied on September 14, 2007. (App. 26) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury....

18 U.S.C. § 3282(a) provides:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

18 U.S.C. § 3553(a) provides, in pertinent part:

> (a) Factors To Be Considered in Imposing a Sentence.— The court shall impose a sentence sufficient, but not greater than

necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

* * *

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

STATEMENT OF THE CASE

This Petition raises two important issues stemming from the trial and conviction of Dr. Alfred J. Koonin. Koonin was indicted on February 23, 2001, for conspiracy and other offenses in connection with a murder-for-hire that was attempted – and failed – on

February 23, 1996. Koonin was convicted, and sentenced to a term of imprisonment of 181 months.

1. The first issue raised in this Petition is one that has for many years sharply divided the lower courts. The question is how properly to calculate the statute of limitations: specifically, whether an indictment brought under the five-year general statute of limitations set forth at 18 U.S.C. § 3282 is untimely if no overt act occurred within the five years preceding its filing. Put another way, can an indictment filed on February 23, 2001, be timely if the conspiracy was defeated on February 23, 1996 and no overt act occurred thereafter.

In this case, the indictment charged a conspiracy to murder Sydney Kahn. On the morning of February 23, 1996, Valter Nebiolo attempted, and failed, to kill Kahn. Nebiolo fired several shots through a window at Kahn, but no bullets struck him and Kahn received only minor wounds from the broken window glass. The indictment charged that Nebiolo was hired to kill Kahn by a South African businessman named Ronald Abel.

The police traced the license plate of the car seen leaving the scene of the shooting to Nebiolo's rental car, and learned that the address that Nebiolo gave to the rental car agency was Koonin's. Nebiolo was arrested outside Koonin's apartment building later on February 23, 1996, and taken into custody.

At approximately 1:00 a.m. on February 24, 1996, two San Diego police detectives visited Koonin at his apartment. They informed Koonin of Nebiolo's failed attempt on Kahn's life, and noted that Koonin displayed shock and surprise at that news. Koonin fully

cooperated with the detectives from the outset, and told them everything he knew about Nebiolo. He told them that Abel, who was an old friend of Koonin's from South Africa, had telephoned Koonin to say that Nebiolo was coming to Los Angeles on business for him (Abel). Abel asked Koonin, as a favor, to let Nebiolo stay with him, and to help him find his way around because Nebiolo had never been to California before. Koonin obliged, and when Nebiolo arrived, took him to a car rental agency. Koonin told the police he understood Nebiolo to be visiting on business for Abel, but did not know the details of that business.

Subsequently, Koonin was instructed by an FBI agent to report to the FBI the contents of any call he received from Abel. Accordingly, Koonin informed the FBI that Abel telephoned him on February 26, 1996 to ask whether Nebiolo was returning to South Africa, and that, after Koonin told him what had transpired and asked what was going on, Abel hung up. Koonin similarly reported to the FBI a second call from Abel on February 28, 1996, to ask whether there had been an article about him in the Los Angeles Times. As Koonin told the FBI, he told Abel no. Koonin continued to cooperate with the government, and testified voluntarily before a grand jury in July, 1996, in support of an indictment against Abel and Nebiolo.

However, after Nebiolo negotiated his plea agreement with the government and agreed to cooperate in future proceedings against Abel – whom the government was seeking to extradite from South Africa – Nebiolo told the FBI, in July, 1997, that Koonin supplied him with the gun that he used to shoot at Sydney Kahn. When the FBI questioned Koonin about the gun six months later, Koonin told the agents that he

owned a non-working .22 automatic gun, but did not know where it was. A week later, he advised the FBI agents that he could not find it. Ultimately, the gun that Nebiolo used in the February 23, 1996 shooting – which he dropped and left behind outside Kahn's office – was not introduced into evidence; the FBI never obtained the gun from the San Diego police, who destroyed it at the end of 1999.

Nonetheless, on February 23, 2001, an indictment was filed charging Koonin and Abel with crimes that included conspiring to travel in interstate commerce for murder-for-hire. It charged that Koonin's role in the conspiracy was to assist Nebiolo in obtaining a car, a gun and lodging.

On appeal, Koonin asserted that the indictment was untimely because it was filed five years *and one day* after the object of the alleged conspiracy – the shooting of Sydney Kahn – was defeated. Koonin argued that the limitations period began to run on the *day of* the attempted shooting. The Ninth Circuit disagreed and held that:

> the statute of limitation did not begin to run until the day *after* the shooting, and thus Koonin's indictment was filed on the last possible day of the limitation period.

App. 7. (Emphasis in original)

The Ninth Circuit's holding that the statute of limitations began to run on the day after the attempted shooting – but still encompassed the day of that act – is in direct conflict with this Court's jurisprudence, and with decisions rendered by its sister Circuits that

require proof of an overt act within five years of the indictment's filing date. Put simply, to be valid, an indictment such as this one, filed on February 23, 2001, may only prosecute acts done on or after *February 24, 1996.*[1]

2. The second issue raised in this Petition concerns the inconsistently formulated and unevenly applied standards used by the Circuit Courts in handling the resentencing of defendants who had appeals pending when this Court decided United States v. Booker, 543 U.S. 220 (2005).

Koonin's initial petition for a writ of certiorari was pending before this Court when Booker was decided in January, 2005, and two months later, this Court granted the writ, vacating the judgment and remanding to the Ninth Circuit Court of Appeals "for further consideration in light of United States v. Booker, 543 U.S. 220 (2005)." (App. 17) However, Koonin did *not* receive further consideration under Booker or the factors listed in 18 U.S.C. § 3553(a), because the district court affirmed its prior sentence and the Ninth Circuit held Koonin's challenges to the lack of consideration of § 3553(a) factors foreclosed by its own precedent.

Because "pipeline" defendants, like Koonin, are facing substantially divergent and unfair procedures,

---

[1] The Ninth Circuit's suggestion in dicta, that it could, in the alternative, resolve the question of the indictment's timeliness by deeming the limitations period extended via Abel's two brief phone calls to Koonin *after* Nebiolo was arrested and *after* Koonin cooperated with the police, depends on a misinterpretation of this Court's decision in United States v. Jimenez Recio, 537 U.S. 270 (2003), and cannot revive the expired statute limitations.

and because they are not, like post-Booker defendants, being sentenced with consideration of the factors set forth in 18 U.S.C. §3553(a), as mandated by Booker, Rita v. United States, 127 S. Ct. 2456 (2007) and Gall v. United States, ___S. Ct. ___, 2007 WL 4292116 (Slip. Op., December 10, 2007), this Court should clarify that "pipeline" defendants should receive the same considerations in sentencing as post-Booker defendants.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT IN THE CIRCUITS OVER HOW PROPERLY TO CALCULATE THE STATUTE OF LIMITATIONS SET FORTH AT 18 U.S.C. § 3282(a)

The first issue raised in this Petition is whether an indictment, brought pursuant to 18 U.S.C. § 3282(a), is untimely if no overt act took place within the five years preceding its filing. Although in the Ninth and Eleventh Circuits, such an indictment would be timely, in three other Circuits it would be time-barred. In still two other Circuits, which have internal conflicts, there is no clear answer.

Thus, because there is a a genuine conflict among (and within) the Circuits on the interpretation of this federal criminal statute, an inequitable circumstance has developed in which, on a particular date, the government is time-barred from indicting a person on a set of charges in one Circuit, but free to indict on the identical charges in the neighboring Circuit.

Given the tremendous upsurge in federal conspiracy prosecutions over the past decade, this question regularly arises in the Circuit Courts. Therefore, in order to prevent similarly-situated defendants in different Circuits from receiving wholly disparate treatment, and in order to preserve the integrity of federal prosecutions where indictments were filed close to the date of the statute of limitation's expiry, it is essential that a single and unified interpretation of the statute of limitations time frame govern across all the Circuits.

This Court had appeared to have settled the question. In Grunewald v. United States, 353 U.S. 391 (1957), this Court stated:

> The indictment in these cases was returned on October 25, 1954. *It was therefore incumbent on the Government to prove* that the conspiracy, at least as contemplated in the agreement as finally formulated, was still in existence on October 25, 1951, and *that at least one overt act in furtherance of the conspiracy was performed after that date.*

353 U.S. 391 at 396. (Emphasis supplied) As set forth below, however, despite the Grunewald holding, the Courts have disagreed on whether an indictment is untimely if no overt act took place within the five years preceding its filing.

A. Circuits Following Grunewald

Most Courts – including the First, Sixth and Tenth Circuits, and, in part, the Second and Fifth Circuits – have followed Grunewald and held that for statute of limitations purposes, an indictment filed on, for example, February 23, 2001, does not extend back to acts committed on February 23, 1996, but only to acts committed on or after February 24, 1996. These Circuits, applying Grunewald, have framed the question at issue this way:

> The original indictment was returned on April 14, 1989. The applicable statute of limitation is five years. 18 U.S.C. § 3282. The government must show that the conspiracy continued and at least one overt act in furtherance of the conspiracy occurred after April 14, 1984. Grunewald v. United States, 353 U.S. 391, 397, 77 S.Ct. 963, 970 1 L.Ed.2d 931 (1957).

United States v. Lash, 937 F.2d 1077, 1081 (6th Cir.), cert. denied, 502 U.S. 949 (1991) (Emphasis added). See also United States v. Brown, 332 F.3d 363, 373 (6th Cir. 2003) (January 20, 1999 indictment; in order to carry its burden at trial, the government had to show beyond a reasonable doubt that the specific conspiracy defendants joined was on-going *after* January 20, 1994); United States v. Fitzpatrick, 892 F.2d 162, 166 (1st Cir. 1989) (indictment returned October 1, 1987; Court looks to "the *post-October 1*, 1982 evidence to determine if the statute of limitations is a bar to the defendant's prosecution on the substantive count of the indictment"); United States v. Pinto, 838 F.2d 426, 435 (10th Cir. 1988) (April 1, 1986 indictment and six-year

statute of limitations: "It therefore was incumbent upon the government to prove that the conspiracy was still in existence on April 1, 1980, and that at least one overt act in furtherance of the conspiracy was performed after that date."); United States v. Qayyum, 451 F.3d 1214, 1218 (10th Cir. 2006) (May 22, 2003 indictment and five-year statute of limitations: "Count One . . therefore survives if the government establishes that the conspiracy existed on May 22, 1998, and at least one overt act in furtherance of the conspiracy was performed after that date.")

B. Circuits In Conflict

The Second and Fifth Circuits have similarly followed Grunewald in some decisions, but in other decisions have interpreted the § 3282 statute of limitations to reach the opposite conclusion.

1. The Second Circuit

The Second Circuit has followed Grunewald, for example, in United States v. Brasco, 516 F.2d 816 (2d Cir.), cert. denied, 423 U.S. 860 (1975), involving a single-count conspiracy to influence the Post Office, where the Second Circuit held that for the indictment filed on October 23, 1973 to be timely, the government "had to show that one overt act in furtherance of the conspiracy occurred *after* October 23, 1968," id. at 818 (emphasis supplied), citing Grunewald v. United States, 353 U.S. 391 (1957) and United States v. Portner, 462 F.2d 678 (2d Cir.), cert. denied, 409 U.S. 983 (1972). The Second Circuit also hewed to Grunewald in United States v. Fletcher, 928 F.2d 495, 498-99 (2d Cir.), cert. denied, 502 U.S. 815 (1991) ("Since the indictment was filed on April 4, 1989, the central issue is whether any

of the actions taken on April 5, 1983 [ ] furthered the main goals of the conspiracy") and United States v. Salmonese, 352 F.3d 608, 614 (2d Cir. 2003) (indictment was filed on May 7, 2001, so Court looked at acts *on and after* May 8, 1996).

However, the Second Circuit disregarded Grunewald in United States v. Guerro, 694 F.2d 898 (2d Cir. 1982), cert. denied, 459 U.S. 1222 (1983), involving a conspiracy to receive and sell stolen plastic explosives. The single charged sale took place on December 29, 1976, and the Second Circuit approved the indictment filed on December 29, 1981, relying – without analysis – on the "long-established" *civil* rule enunciated in Burnet v. Willingham Loan & Trust Co., 282 U.S. 437, 439 (1931), where this Court stated that, generally:

> When the period allowed for doing an act is to be reckoned from ... the happening of any ... event, the day on which the event happened may be regarded as an entirety, or a point of time; and so may be excluded from the computation.

Burnet, 282 U.S. at 439, quoted in Guerro, 694 F.2d at 901. That rule extended to criminal cases, the Second Circuit reasoned, through the language of the general filing rule of then-Rule 45 of the Federal Rules of Criminal Procedure.[2] Guerro, 694 F.2d at 901-02.

---

[2] Guerro quoted Rule 45(a) – in effect in 1982 – as providing that "In computing any period of time the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed is to be included ..." (Emphasis supplied). The present wording of Rule

Although acknowledging that Rule 45 is "not controlling" because – unlike a statute of limitations – the filing rule automatically extends a computed period that would otherwise end on a weekend or holiday to the next non-holiday weekday, the Second Circuit nevertheless, without explanation, deemed Rule 45 "instructive," id., and upheld the conviction.

2. The Fifth Circuit

Similarly, the Fifth Circuit's holdings have not been consistent. That Court followed Grunewald when it reversed a conviction in United States v. Bethea, 672 F.2d 407 (5th Cir. 1982), on the ground that the indictment was time-barred; that is, the February 21, 1980 indictment required proof of an overt act *after* February 21, 1975. Id. at 419.[3] See also United States v. Mann, 161 F.3d 840, 856-57 (5th Cir. 1989), cert. denied, 526 U.S. 1117 (1999) (indictment issued on June 30, 1993; "to fall within the applicable limitations period[], the last act in furtherance of a conspiracy . . . had to occur after June 30, 1988.").

Like the Second Circuit, the Fifth Circuit has also taken a contrary position: in United States v. Davis, 533 F.2d 921, 926 (5th Cir. 1976), the Fifth Circuit determined that for an indictment filed on September 5, 1974 to be valid, the government had to allege and prove that an overt act occurred *on or after* September

---

45(a) could no longer extend to 18 U.S.C. § 3282, since it is specifically limited to the computation of "any period of time specified in these rules, any local rule, or any court order."

[3] The Koonin Court purported to distinguish Bethea as a Fifth Circuit "drafting error." (App. 8-9, n.5)

5, 1969. However, because it concluded that the last overt act took place weeks before that date, the Davis Court did not actually apply its stated "on or after" test. Nonetheless, as set forth below, the Ninth Circuit, in this case, relied on Davis's "on or after" language to find Koonin's indictment timely.

C. Circuits Ignoring Grunewald

Thus, the Ninth Circuit's conclusion that, to satisfy § 3282's five-year statute, an indictment filed on February 23, 2001 requires an overt act *on or after* February 23, 1996 – rather than *after* February 23, 1996 – is in direct conflict with this Court's holding in Grunewald, and the holdings of its sister Circuits.

Indeed, the Koonin Court did not even mention Grunewald in its decision. Instead, it deemed the indictment timely by relying on the Second Circuit's ruling in Guerro, supra, the Fifth Circuit's language in Davis, supra, and the Eleventh Circuit's adoption of Guerro in United States v. Butler, 792 F.2d 1528, 1533 (11th Cir.), cert. denied, 479 U.S. 933 (1986) (conspiracy to import marijuana continued until July 12, 1979, when vessel carrying marijuana was boarded and seized; indictment filed on July 12, 1984 was timely).[4]

---

[4] The D.C. Circuit, which has not addressed the question directly, has interpreted the statute in dicta. Despite its repeated references to Grunewald, the Court has used language that is more aligned with the reasoning of the Ninth and Eleventh Circuits. In United States v. Hitt, 249 F.3d 1010, 1015 (D.C. Cir. 2001), that Court affirmed the dismissal of a conspiracy count on the grounds that, in order for the October 19, 1999, indictment to be timely, the government had to show that a conspiracy existed and an overt act occurred "no more than five years prior to the filing of the indictment (i.e., at a point no earlier than October 19, 1994);" since

In Koonin, the Ninth Circuit also relied on two cases that were guided by the *civil* rule, one of which was a 1930's case significantly predating Grunewald: Wiggins v. United States, 64 F.2d 950 (9th Cir.), cert. denied, 290 U.S. 657 (1933) (relying on civil rule in Burnet v. Willingham Loan & Trust Co., 282 U.S. 437 (1931)), and United States v. Tawab, 984 F.2d 1533 (9th Cir. 1993)(per curiam) (relying on Burnet and Wiggins).

The Ninth Circuit's decision is even contrary to its own precedent. See, e.g., United States v. Charnay, 537 F.2d 341 (9th Cir.), cert. denied, 429 U.S. 1000 (1976) (statute of limitations in conspiracy cases starts to run on date of last overt act); Lambert v. Conrad, 308 F.2d 571 (9th Cir. 1962) (per curiam)(statue of limitations for civil conspiracy ran from the date of the last overt act); and Bergschneider v. Denver, 446 F.2d 569 (9th Cir. 1971)(per curiam)(same). (App. 9) However, the Ninth Circuit discounted those cases because they did not confront the same "precise issue" – that is, they did not involve prosecutions in which the indictment was filed on the anniversary of the last overt act.

Congress has declared that the statute of limitations should not be extended "[e]xcept as otherwise expressly provided by law." 18 U.S.C. § 3282. This Court has also held that "criminal limitations statutes are to be liberally interpreted in favor of repose." Toussie v. United States, 397 U.S. 112, 115 (1970), quoting United States v. Scharton, 285 U.S. 518, 522 (1932). Cases, like this one, in which the Courts rely on the rules relating to the filing of papers, extend

---

the conspiracy ended on September 14, 1994, the indictment was untimely by more than a month.

the statute of limitations by *one day*. It is important that this Court clarify and define the correct interpretation of § 3282's statute of limitations, so that the government may not take advantage of the split among and within the Circuits improperly to extend the statute of limitations.[5]

Therefore, this Court should clarify its holding in Grunewald to confirm that, to be valid under 18 U.S.C. § 3282, an indictment such as this one, filed on February 23, 2001, may only prosecute acts done on or after February 24, 1996.

---

[5] In Koonin, the Ninth Circuit suggestion, in dicta, that it could alternatively resolve the question of the indictment's timeliness by deeming the limitations period extended via Abel's two brief phone calls to Koonin after the conspiracy was defeated relies on a misinterpretation of United States v. Jimenez Recio, 537 U.S. 270, 274 (2003), which held that a conspiracy does not automatically terminate because *the government*, unbeknownst to some of the co-conspirators, has defeated the conspiracy's object. (App. 6-7) Koonin's case presents no question involving a "secret" government defeat of the conspiracy's objective, and Jimenez Recio does not permit a phone call to extend the statute of limitations after the conspiracy has terminated.

A conspiracy ends when its central purpose has been accomplished. Krulewitch v. United States, 336 U.S. 440, 442 (1949). The conspiracy to murder Kahn ended on February 23, 1996, not only because of the arrest of Nebiolo, but because the attempted murder had failed. The two later conversations *did not further* the conspiracy: Abel called Koonin *after* Nebiolo was arrested and *after* Koonin had already spoken to the police and was cooperating with the FBI. Abel did not testify. Koonin testified that, in the first conversation, Abel asked him if Nebiolo had left the United States, and he then told Abel about Nebiolo's arrest; in the second, that Abel called to ask him about a newspaper article. Neither brief conversation reflected any effort to revive the failed agreement, and neither, under Jimenez Recio, extends the statute of limitations.

II. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE APPROPRIATE PROCEDURE FOR RESENTENCING DEFENDANTS WHOSE CASES WERE ON DIRECT APPEAL WHEN BOOKER WAS DECIDED, AND ALSO TO RESOLVE A CONFLICT IN THE CIRCUITS OVER WHAT STANDARD DISTRICT COURTS SHOULD APPLY IN THOSE RESENTENCINGS

When this Court decided United States v. Booker, 543 U.S. 220 (2005), in January, 2005, there were thousands of federal defendants who had cases pending on direct appeal. These so-called "pipeline cases" raised the important question of what steps were required of the appellate courts to effect compliance with Booker's new sentencing regime. There has never been a conclusive answer, and the Circuit Courts have applied tests that are inconsistent both amongst themselves and with the mandate of Booker itself.

There are significant procedural and pragmatic differences that separate the pre-Booker, mandatory Guideline sentencings, and post-Booker sentencings, which are governed by the procedures articulated in Rita v. United States, 127 S. Ct. 2456 (2007) and Gall v. United States, ___S. Ct. ___, 2007 WL 4292116 (Slip. Op., December 10, 2007) to ensure "individualized" review and consideration of all the factors set forth in 18 U.S.C. §3553(a). Instead of receiving Booker-mandated individualized consideration, however, "pipeline" defendants have been subjected to markedly inconsistent and unfairly applied standards; in many circuits, their opportunity for *any* sentencing under Booker depends on their having raised, pre-Booker,

objections that, had they been raised then, would have been deemed frivolous.

Just a year after Booker was decided, the Sixth Circuit commented that "[a]chieving agreement between the Circuit Courts and within each Circuit on post-Booker issues has, unfortunately, been like trying to herd frogs into a wheelbarrow." United States v. McBride, 434 F.3d 470, 474 (6th Cir. 2006). Since McBride, inconsistency among the Circuits has grown.

In the Ninth Circuit, a district court approaching a resentencing under Booker must only "answer the question whether the sentence would have been different had the court known that the Guidelines were advisory," United States v. Ameline, 409 F.3d 1073, 1079 (9th Cir. 2005)(en banc), but "need not determine or express" what the "other" sentence would have been. Id. at 1085. That standard invites a retrospective review of whether the outcome would be different, rather than the Booker-mandated *prospective* analysis of the individual § 3553(a) factors and goals. Indeed, a full resentencing hearing is appropriate only where the sentencing judge determines that he would have imposed a materially different sentence under advisory Guidelines. Id. at 1078-79. If he would not have, then, Ameline instructs, he should "place on the record a decision not to resentence, with an appropriate explanation." Id. at 1085.

A. Circuits In Conflict

In the Second, Seventh and D.C. Circuits, like the Ninth, the district court makes the threshold decision of whether it would have sentenced differently if the Guidelines had been advisory, before permitting a full

resentencing. See, e.g., United States v. Crosby, 397 F.3d 103, 118-120 (2d Cir. 2005) (remanding for the "threshold determination" of "*whether* to resentence;" question is would district court have imposed a "nontrivially different sentence"); United States v. Paladino, 401 F.3d 471, 484 (7th Cir.), cert. denied, 546 U.S. 849 (2005) ("what an appellate court should do in Booker cases in which it is difficult ... to determine whether the error was prejudicial is, while retaining jurisdiction of the appeal, order a limited remand to permit the sentencing judge to determine whether he would (if required to resentence) reimpose his original sentence."). See also United States v. Coles, 403 F.3d 764, 770 (D.C. Cir.), cert. denied, 546 U.S. 828 (2005) (adopting Crosby rule).

Under this approach – even assuming that "materially" or "nontrivially" different were susceptible to clear or consistent interpretation – any benefit of a limited remand is meaningless since a district judge cannot determine, measurably, whether his "other" sentence would be different *without calculating* what that "other" sentence would be.

Other Circuits have taken an even less generous approach to its "pipeline" defendants: in the First, Fifth, Eighth and Eleventh Circuits, if the reviewing court cannot determine whether the Sixth Amendment error was prejudicial, it does not send it back to the district court for assessment, but instead, since the defendant has not carried his burden, it denies relief. See United States v. Rodriguez, 398 F.3d 1292, 1301 (11th Cir.), cert. denied, 545 U.S. 1127 (2005) (because Court of Appeals would have to speculate whether district court might have given a different sentence, appellant could not meet burden of showing a reasonable probability

that the result would have been different but for the error; relief foreclosed.) See also United States v. Mares, 402 F.3d 511, 522 (5th Cir. 2005) (relief denied because "no indication in the record from the sentencing judge's remarks or otherwise that gives us any clue as to whether she would have reached a different conclusion"); United States v. Antonokopolous, 399 F.3d 68, 75 (1st Cir. 2005) (defendant "must point to circumstances creating a reasonable probability that the district court would impose a different sentence more favorable to the defendant" under advisory Guidelines); United States v. Pirani, 406 F.3d 543, 552 (8th Cir.) (en banc), cert. denied, 546 U.S. 909 (2005) (deeming the Ameline/Crosby approach "creative" and rejecting any remand as contrary to its obligation to evaluate plain error based solely on existing record).

The possibility of relief in these Circuits thus hinges on whether "past comments" of sentencing judges used enough "magic words." See United States v. Thompson, 422 F.3d 1285, 1304-05 (11th Cir.)(Tjoflat, J., specially concurring), cert. denied, 127 S.Ct. 1285 (2005) (calling the process "as arbitrary as it is absurd," since "a defendant is rewarded with a new sentencing hearing only if the sentencing judge took the entirely inappropriate step of publicly criticizing the law that required him to impose the sentence.")

In the Fourth Circuit, for some, the Court has presumed plain error and granted automatic resentencing, see e.g., United States v. Hughes, 401 F.3d 540, 555-56 (4th Cir. 2005) (Booker violation was sentencing enhancements based on facts not found by a jury); but for others, if the case-by-case determination does not show that the risk of prejudice to the defendant justified a presumption of prejudice, the defendant is

required to demonstrate actual prejudice, on a "nonspeculative basis," from the appellate record. United States v. White, 405 F.3d 208, 215-25 (4th Cir.), cert. denied, 546 U.S. 1023 (2005) (Booker violation was treating the Guidelines as mandatory).

The Sixth Circuit has, for some claims, incorporated a rebuttable presumption of prejudice in the determination of whether to remand. See United States v. Barnett, 398 F.3d 516, 527-29 (6th Cir.), cert. dismissed, 545 U.S. 163 (2005) (use of mandatory Guidelines was plain error; presumption of prejudice rebuttable by evidence in trial record that judge would not have given a lower sentence.) Compare United States v. Oliver, 397 F.3d 369, 379, 381 n.3. (6th Cir. 2005) (Booker violation stemmed from invalid enhancements; no presumption necessary because appellate court "would be usurping the discretionary power granted to the district courts by Booker" if it assumed that the district court would have given the same sentence post-Booker.)

B. Plain Error Is An Unfair Standard

Underlying this dispute is the question of whether it is appropriate at all to subject defendants' Booker claims to plain error analysis; Booker required reviewing courts to apply "ordinary prudential doctrines," including "whether the issue was raised below, and whether it fails the 'plain-error' test." Booker, 53 U.S. at 225.[6] Plainly, no defendant can be

---

[6] Under the plain error standard of Rule 52(b), there must be "(1) error, (2) that is plain, and (3) that affects substantial rights. If these three conditions are met, an appellate court may exercise its discretion to notice a forfeited error, but only if (4) the error

faulted for failing to anticipate Booker's fundamental alteration of the sentencing process, but worse, the legal climate in the years following Apprendi v. New Jersey, 530 U.S. 466 (2000) strongly discouraged defendants from raising on appeal claims under Apprendi (and later, under Blakely v. Washington, 542 U.S. 296 (2004)), because most Circuits had held that Apprendi, and later, Blakely, did not apply to the Guidelines.[7] As eloquently stated by Judge Bye of the Eighth Circuit:

> In actuality, a pre-Blakely demand by defendants to have a jury find facts applicable to sentencing beyond a reasonable doubt would face a cold reception. While some judges may have simply dismissed the argument, other judges would have rejected it as ridiculous, while still others would have admonished the lawyer for wasting the court's time. When so much of a lawyer's effectiveness is based upon his or her reputation and credibility, why would any advocate risk diluting any meritorious arguments with something the overwhelming majority of judges would have deemed frivolous. The majority now sets out to punish defendants for failing to burden the court with objections deemed frivolous only a matter of months ago.

---

seriously affects the fairness, integrity, or public reputation of judicial proceedings." p. 1548. Johnson v. United States, 520 U.S. 461 (1997), citing United States v. Olano, 507 U.S. 725 (1993).

[7] See, e.g., United States v. Guevara, 277 F.3d 111, 120 n.4 (2d. Cir. 2001) (listing circuits that held Apprendi did not apply to the Guidelines).

United States v. Pirani, 406 F.3d 543, 566 (8th Cir.) (en banc) (Bye, J., dissenting), cert. denied, 546 U.S. 909 (2005). See also United States v. Gonzalez-Huerta, 403 F.3d 727, 751 (10th Cir.) (Briscoe, J., dissenting), cert. denied, 546 U.S. 967 (2005) (unlike ordinary plain error review, where a reasonable determination of an error's prejudicial effect can be assessed by review of the record below, as to pre-Booker sentencing proceedings, conducted "under what we now know was the mistaken assumption [that the Guidelines were mandatory] . . .there was no opportunity or incentive, as there is now post-Booker, for [defendants] or the government to present evidence or arguments outside of the bounds allowed by the Guidelines."); United States v. Barnett, 398 F.3d 516, 528 (6th Cir.), cert. dismissed, 545 U.S. 163 (2005) (recognizing that its own well-established precedent "consistently turned back Sixth Amendment challenges to Guideline enhancements" if sentence was below statutory maximum.)

As Judge Bye acknowledged, "it is impractical, if not impossible, to gauge the prejudice actually suffered" under a mandatory, not advisory, Guideline regime. Pirani, 406 F.3d at 564. Application of this harsh standard is particularly unnecessary since this Court anticipated a separate category of plain-error errors that should be presumed to be prejudicial if the defendant cannot make a specific showing of prejudice. See United States v. Olano, 507 U.S. 725, 735 (1993).

In Koonin, the district court satisfied its Ameline remand obligation by entering an order, following a "status hearing," that stated, "Court affirms sentencing previously imposed." (App. 23) At that hearing, the district court indicated that he had reviewed the presentence report and basically the same facts

presented at the initial sentencing, then invoked the precise words Ameline required to dispose of a case:

> Having reviewed all, the court is satisfied and confident that, considering the 3553(a) factors, the sentence imposed by the court would not be materially different, and the court will reaffirm the sentence previously imposed.

App. 21.

Viewed together with the Ninth Circuit's affirmance of that decision, it is clear that Koonin received no more than a perfunctory review of old information – those factors that the district court was barred from considering before Booker, and gave short shrift to after. Indeed, the district court stated that the issues presented for consideration – defendant's age, health, and the disparity of his sentence being much longer than that of the admitted hitman – "basically echo the arguments and factors presented to the court at the time of the original sentencing in this matter." But critically, there is *no indication* that he followed the Booker/Rita/Gall mandate to be guided by §3553(a)'s directive to "impose a sentence sufficient, but not greater than necessary." Surely, given Koonin's lack of criminal history and minor role, a sentence of 181 months – 34 months more than the professional hitman got – was "greater than necessary" to ensure deterrence.

The result, therefore, is that "pipeline" defendants such as Koonin – whose sentence was vacated and expressly remanded for reconsideration in light of the post-Booker § 3553(a) mandate – are thus being "resentenced" under standards that bypass those

very considerations. The unfairness of brushing them aside is particularly striking in light of Gall v. United States, issued this December, reaffirming that an appellate court reviewing a sentence, "must first ensure that the district court has committed no significant procedural error," Gall, 2007 WL 4292116, * 7 (Slip. Op. at 12), and then ensure that sentencing courts undertake an "individualized" review that is manifested in specific and particular steps:

> As we explained in *Rita*, a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. . . [A]fter giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party. In so doing, he may not presume that the Guidelines range is reasonable. *See id.* at ___. He must make an individualized assessment based on the facts presented. . . After settling on the appropriate sentence, he must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.

Gall, 2007 WL 4292116, * 7 (Slip. Op. at 11-12), quoting Rita v. United States, 127 S. Ct. 2456 (2007). Similarly, in Gall's companion case, Kimbrough v. United States, the Court noted that Kimbrough's sentencing was properly conducted where the district court began by calculating and considering the advisory Guidelines range, then considered the individual § 3553(a) factors,

and then "framed its final determination in line with § 3553(a)'s overarching instruction to 'impose a sentence sufficient, but not greater than necessary,' to accomplish the sentencing goals advanced in § 3553(a)(2)." ___ S. Ct. ___, 2007 WL 4292040,*4 (Slip. Op., December 10, 2007, at 21-22).

Accordingly, fundamental fairness under Booker and its progeny requires a district court to do in a remand case that which it would have to do on a first-time sentencing: consider all of the § 3553(a) factors and make an individualized assessment of an appropriate sentence, and put it on the record with sufficient explanation to permit meaningful appellate review. Because *none* of the Circuits uniformly accord the remand sentencings the same level of "individual assessment" that is mandated by Rita and Gall for first-time sentencings, and further because there is a genuine conflict among the Circuits on the proper procedure and standards to apply in re-sentencing "pipeline" defendants, this Court's review is warranted.

CONCLUSION

This Petition raises two important constitutional issues about which the law is in conflict. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Nathan Z. Dershowitz
Amy Adelson
DERSHOWITZ, EIGER
& ADELSON, P.C.
220 Fifth Avenue
Suite 300
New York, NY 10001
(212) 889-4009

COUNSEL OF RECORD

Daniela Klare Elliott
Of Counsel

December 18, 2007

APPENDIX

United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Alfred J. **KOONIN,** Defendant-Appellant.

No. 02-50350.

Argued and Submitted Aug. 6, 2003.
Filed March 25, 2004.

Appeal from the United States District Court for the Southern District of California; Napoleon A. Jones, District Judge, Presiding. D.C. No. CR-96- 01442-NAJ.

Before: NOONAN, TALLMAN, and RAWLINSON, Circuit Judges.

RAWLINSON, Circuit Judge:

The question we must decide is whether the statute of limitation begins to run on the day of the last overt act in furtherance of a conspiracy, or the following day. Agreeing with the Second and Eleventh Circuits, we hold that when computing the time within which a prosecution for conspiracy may be commenced, the statute of limitation begins to run the day *after* the last overt act is committed.[1] Our holding AFFIRMS the conviction in this case.

---

[1] Koonin raised other issues on appeal, which are resolved in a separate memorandum disposition filed contemporaneously with this opinion.

I. BACKGROUND

South African businessman Ronald Abel had two constants in his life--his childhood friend, Alfred Koonin, and his hapless business partner, Sydney Kahn. In 1986, a business deal between Kahn and Abel went awry. Kahn subsequently fled to La Jolla, California, leaving behind a large debt as well as several angry investors, including Abel. Over the next few years, Kahn repeatedly promised, yet failed, to repay the debt. As interest accrued, Kahn's debt continued to grow. Keeping pace with that debt was Abel's growing anger. In an attempt to appease Abel's wrath and assuage his financial concerns, Kahn unwisely named Abel the beneficiary of his three life insurance policies. If Kahn died, Abel stood to collect approximately $425,000.

By February 1996, Abel had decided to recoup his investment by collecting on these insurance policies. Of course, Abel could not collect as long as Kahn was alive. To hasten Kahn's demise, Abel hired Valter Nebiolo to travel from South Africa to California to kill Kahn. Nebiolo agreed to participate in the murder plot on the conditions that Abel share the insurance proceeds and supply airline tickets, expense money, a gun, a car for the trip to La Jolla, and a place to stay until the job was done. Abel agreed to all the conditions and gave Nebiolo the name and address of a friend who would provide Nebiolo with the gun, car, and lodging. That friend was Koonin.

On February 18, 1996, Nebiolo arrived in Los Angeles, California. Koonin met Nebiolo at the airport, drove him back to Koonin's apartment, and offered Nebiolo the choice of two handguns--a .44 magnum and a .357 magnum. Nebiolo examined the weapons, determined

that both were loaded and in working condition, and chose the .357 as the murder weapon because it would be easier to conceal. Koonin also provided Nebiolo with a map to La Jolla and showed him the route to traverse.

The next day, Koonin helped Nebiolo rent a car and Nebiolo left for La Jolla. After watching Kahn's home and office for a few days, Nebiolo returned to Koonin's apartment in Los Angeles. The two discussed Nebiolo's reconnaissance trip and Nebiolo informed Koonin that the job would require a smaller, quieter gun. They also discussed Kahn, with Koonin assuring Nebiolo that Kahn was defrauding people in the United States just as he had done in South Africa. Koonin stated *1252 that Kahn deserved to be killed, describing him as someone who "had it coming." Koonin then left his apartment for about two hours. When he returned, Koonin had what Nebiolo needed--a smaller gun. Nebiolo examined the .25 caliber semi-automatic pistol and confirmed that it was fully functional.

On February 23, 1996, Nebiolo returned to La Jolla to kill Kahn. Although grazed by two bullets and struck by flying glass, Kahn survived the attack. Nebiolo fled the scene, returning to Koonin's apartment, but was arrested that same day and subsequently indicted by a grand jury. Koonin's role in the conspiracy became clear only after Nebiolo pled guilty and agreed to cooperate with the government as part of his plea agreement.

On February 23, 2001, exactly five years to the day after Nebiolo attempted to kill Kahn, a grand jury returned a superseding indictment charging Koonin with conspiracy to travel and cause others to travel in foreign commerce in the commission of murder-for-hire, in violation of 18 U.S.C. § 1958(a); traveling and

causing others to travel in foreign commerce in the commission of murder-for-hire, in violation of 18 U.S.C. § 1958(a); the extortionate collection of debt, in violation of 18 U.S.C. § 894; false declarations before a grand jury, in violation of 18 U.S.C. § 1623;[2] and aiding and abetting, in violation of 18 U.S.C. § 2. Koonin was convicted on all counts.[3]

Koonin appeals his conviction, arguing--for the first time on appeal--that the February 23, 2001 indictment was returned one day too late, thus barring prosecution of four of the five counts with which he was charged. We have jurisdiction pursuant to 28 U.S.C. § 1291.

II. STANDARD OF REVIEW

When a statute of limitation began to run is a question of law typically reviewed de novo. *Orr v. Bank of America*, 285 F.3d 764, 780 (9th Cir.2002). However, Koonin did not raise this particular issue before the district court. Failure to comply with the statute of limitation is an affirmative defense that is generally waived if not raised at trial. *United States v. LeMaux*, 994 F.2d 684, 689 (9th Cir.1993). Nevertheless, "[a]lthough the general rule in this circuit is that an

---

[2] In the grand jury proceedings, Koonin testified that he did not know the purpose of Nebiolo's trip to the United States. He stated that he never saw Nebiolo with a gun and was not aware that Nebiolo had one. Koonin also told the grand jury that he had no contact with Abel between February 18, 1996, when Abel called to confirm that Nebiolo had arrived in Los Angeles, and February 23, 1996, when Nebiolo was arrested in connection with the shooting.

[3] Koonin was not named in Count Three of the superseding indictment.

appellate court will not consider an issue raised for the first time on appeal, we will reach the question if it is purely one of law and the opposing party will suffer no prejudice because of failure to raise it in the district court." *United States v. Thornburg*, 82 F.3d 886, 890 (9th Cir.1996) (citation omitted). Because the statute of limitation issue has been fully briefed by both parties, the government will not be prejudiced if we address it.

III. DISCUSSION

Koonin was convicted of offenses that do not specify statutes of limitation. As a result, the five-year general statute of limitation for noncapital offenses applies. *See* 18 U.S.C. § 3282.[4] Nebiolo attempted *1253 to murder Kahn on February 23, 1996. The superseding indictment charging Koonin for his role in the murder-for-hire plot was returned on February 23, 2001. Koonin argues that the indictment was filed one day too late, barring prosecution of every count but one--the perjury offense committed when Koonin testified before the grand jury. The government presents two counter-arguments: (1) the conspiracy did not actually end until February 28, 1996, and (2) even if the conspiracy did end on February 23, 1996, the statute of limitation did not begin to run until the following day.

---

[4] 18 U.S.C. § 3282 provides, in pertinent part, that "[e]xcept as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

The indictment specifically charges that the conspiracy continued up to and including February 28, 1996, when Abel called Koonin to confirm that Nebiolo had left the United States. During that phone call, Koonin informed Abel that Nebiolo had been arrested for attempted murder. According to Koonin, Abel was stunned to hear the news. The two spoke again approximately two days later when Abel called to see if his name had been mentioned in the newspapers in connection with the shooting.

The government contends that the phone call regarding Nebiolo's departure was the last overt act committed in furtherance of the conspiracy, thereby triggering the statute of limitation. In short, the government asserts that the conspiracy ended, and the statute began to run, not when Nebiolo was arrested, but when all the conspirators realized that the murder-for-hire plot had been thwarted.

"[T]he Government's defeat of the conspiracy's objective will not necessarily and automatically terminate the conspiracy." *United States v. Jimenez Recio*, 537 U.S. 270, 275, 123 S.Ct. 819, 154 L.Ed.2d 744 (2003). In other words, "[w]here police have frustrated a conspiracy's specific objective but conspirators (unaware of that fact) have neither abandoned the conspiracy nor withdrawn," then the conspiracy continues. *Id.* The police frustrated the conspiracy's specific objective when they arrested Nebiolo on February 23, 1996. However, Abel's first subsequent phone call to Koonin asked, in effect, if Nebiolo had successfully accomplished the object of the conspiracy. Abel's stunned reaction to the news of Nebiolo's arrest demonstrates that he was unaware the murder-for-hire plot had unraveled, thereby establishing that Abel had neither abandoned

nor withdrawn from the conspiracy before that point.

Although Koonin learned of Nebiolo's arrest hours after it took place on February 23, 1996, no evidence suggests that Koonin abandoned or withdrew from the conspiracy at that time. "Mere cessation of activity is not enough to start the running of the statute...." *United States v. Borelli*, 336 F.2d 376, 388 (2d Cir.1964), *cert. denied*, 379 U.S. 960, 85 S.Ct. 647, 13 L.Ed.2d 555 (1965). Instead, withdrawal requires "affirmative action, either the making of a clean breast to the authorities ... or communication of the abandonment in a manner reasonably calculated to reach co-conspirators." *Id.* *See also* *United States v. Lothian*, 976 F.2d 1257, 1261 (9th Cir.1992). Koonin undertook no such affirmative action.

If we accept the government's argument that the conspiracy continued until February 28, 1996, the indictment returned on February 23, 2001 was well within the five-year statute of limitation. However, even if we accept Koonin's argument that the last overt act occurred when Nebiolo shot Kahn and that the conspiracy ended with *1254 Nebiolo's arrest on February 23, 1996, rather than February 28, 1996, the indictment was still timely. Persuaded by the reasoning of the Second and Eleventh Circuits, we hold that the statute of limitation did not begin to run until the day *after* the shooting, and thus Koonin's indictment was filed on the last possible day of the limitation period.

In *United States v. Guerro*, 694 F.2d 898 (2d Cir.1982), the defendants were charged with conspiracy to sell explosives stolen from the United States. The sale occurred on December 29, 1976, and the indictment was filed on December 29, 1981. *Id.* at 899. The "[d]efendants moved to dismiss the indictment on the

ground that the prosecution was barred by the five-year period of limitations provided in 18 U.S.C. § 3282." *Id.* at 900. "On the premise that the day of the last overt act is counted as the first day of the limitations period," the defendants in *Guerro,* like Koonin, argued that the indictment was filed one day too late. *Id.*

The government countered that when "computing the time within which a prosecution may be commenced, the first day counted is the day *following* that on which the offense was committed." *Id.* (emphasis added). The Second Circuit agreed with the government's argument, noting that"[t]he long-established general rule is that a statute of limitations begins to run on the day following the day on which the event giving rise to the cause of action occurred." *Id.* at 901 *(citing Burnet v. Willingham Loan & Trust Co.*, 282 U.S. 437, 439, 51 S.Ct. 185, 75 L.Ed. 448 (1931)).

This principle, the Court noted, had been applied in criminal as well as civil cases. *Id. See, e.g., United States v. Davis*, 533 F.2d 921, 923, 926 (5th Cir.1976) (holding that for an indictment returned on September 5, 1974 to be timely, the government had to prove that the defendant committed an overt act in furtherance of the conspiracy *on or* after September 5, 1969) (emphasis added).[5] As *Davis* illustrated, this principle was equally

---

[5] Koonin's reliance on *United States v. Bethea*, 672 F.2d 407 (5th Cir.1982) is unavailing. In *Bethea*, the Fifth Circuit, seemingly contradicting its prior holding in *Davis*, found that for an indictment filed on February 21, 1980 to be timely, the government had to prove that the defendant engaged in racketeering activity after, rather than *on or* after, February 21, 1975. *See id.* at 419. It is unclear whether the creation of an intra-circuit split of authority was a purposeful reversal of *Davis* or the product of inadvertent oversight. Given that *Bethea* cites *Davis* with approval and does

applicable to criminal prosecutions for substantive offenses as well as conspiracy charges. *See* Guerro, 694 F.2d at 903.

In *United States v. Butler*, 792 F.2d 1528 (11th Cir.1986), the defendants challenged their convictions for conspiracy to import and possess marijuana, contending that if the last overt act in furtherance of the conspiracy was committed on July 12, 1979, the July 12, 1984 indictment was filed one day too late. *Id.* at 1531. Finding the *Guerro* decision persuasive, the Eleventh Circuit held that in conspiracy cases--whether an overt or covert act is alleged--the day following the event is when the statute of limitation begins to run. *Id.* at 1532-33. In a case where the conspiracy continued until July 12, 1979, the following day was the first day of the limitation period, and the indictment filed on July 12, 1984 was timely. *Id.* at 1533.

This Circuit has long held that the day of the offense is excluded when determining the trigger date for the statute of limitation. *See, e.g.*, ***1255** *Wiggins v. United States*, 64 F.2d 950, 950-51 (9th Cir.1933) (holding that an indictment returned on March 7, 1930 was not barred by a three-year limitation statute where the offense occurred on March 7, 1927); *see also* *United States v. Tawab*, 984 F.2d 1533, 1534 (9th Cir.1993) (per curiam) (holding that a five-year limitation period for a crime completed on February 15, 1986 expired on February 15, 1991.)

---

not expressly state, or even imply, that the decision overrules *Davis*, the omission appears to be a drafting error. In any event, *Davis* is consistent with our precedent, *see infra*.

Admittedly, this Court has noted in conspiracy cases that the statute of limitation begins to run on the date of the last overt act alleged, implying that the day of the last overt act is included in determining when the statute of limitation was triggered. *See, e.g.*, *Lambert v. Conrad*, 308 F.2d 571 (9th Cir.1962) (per curiam); *see also* *Bergschneider v. Denver*, 446 F.2d 569 (9th Cir.1971) (per curiam); *United States v. Charnay*, 537 F.2d 341, 354 (9th Cir.1976). However, because these cases did not involve prosecutions in which the indictment was filed on the anniversary of the last overt act, there was no need to analyze whether an indictment filed on this anniversary was timely. In these cases, expiration of the limitation period was not even close, and the finely tuned timing issue we now address was not presented. Because the cases that could be read to imply a holding contrary to the one we reach did not analyze the precise issue we now confront, they do not change our conclusion here. *See* *United States v. Joyce*, 357 F.3d 921, 924-25 (9th Cir.2004).

IV. CONCLUSION

Persuaded by the reasoning of the Second and Eleventh Circuits, and in keeping with our own analogous precedent, we conclude that the day on which the last overt act was committed in furtherance of a conspiracy is excluded from the statute of limitation period. Thus, when computing the time within which a prosecution for conspiracy must commence, the clock starts the day after the last overt act is committed.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
MAR 25, 2004
CATHY A. CATTERSON,
CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,	
	No. 02-53050
Plaintiff - Appellee,	
	D.C. No. CR-96-
v.	01442-NAJ
ALFRED J. KOONIN,	MEMORANDUM*
Defendant - Appellant.	

Appeal from the United States District Court
for the Southern District of California
Napoleon A. Jones, District Judge, Presiding

Argued and Submitted August 6, 2003
Pasadena, California

Before: NOONAN, TALLMAN and RAWLINSON, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

1. Reviewing for plain error, *see United States v. Timmins*, 301 F.3d 974, 983 (9th Cir. 2002), we reject Koonin's assertion that there was insufficient evidence to support his conviction. Viewing the evidence in the light most favorable to the government, a reasonable juror could have convicted Koonin. *See United States v. Booth*, 309 F.3d 566, 574 n.5 (9th Cir. 2002).

2. Koonin was convicted on all counts for which he was charged in the indictment. That the jury verdict form misnumbered the counts did not alter the *content* of the charges. Thus, the district court acted within its discretion in correcting the verdict form pursuant to Fed. R. Crim. P. 36. *See United States v. Penna*, 319 F.3d 509, 513 (9th Cir. 2003).

3. Koonin was charged with providing only one false declaration before the grand jury. Introduction of evidence of other discrepancies in Koonin's grand jury testimony did not constitute constructive amendment of the indictment. Koonin's conflicting statements -- admissions of a party opponent under Fed. R. Evid. 801(d) -- were used to prove Koonin's guilt on the other crimes with which he was charged. Allowing consideration of these statements did not constitute plain error. *See United States v. Percy*, 250 F.3d 720, 725 (9th Cir. 2001).

4. Koonin did not receive ineffective assistance of counsel.[1] His pre-arrest admissions were made when he

---

[1] We review Koonin's ineffective assistance of counsel claim on direct appeal because the record was fully developed in conjunction with Koonin's motion for a new trial. *See United States v. Ross*, 206 F.3d 896, 900 (9th Cir. 2000).

was not in custody, *see Miranda v. Arizona*, 384 U.S. 436, 444 (1966), and his post-arrest interrogation was preceded by *Miranda* warnings. Thus, no valid basis existed to suppress his statements.

The gun at issue was not destroyed at the request of or by the federal government, and there was no evidence in the record that the destruction was done in bad faith. *See United States v. Belden*, 957 F.2d 671, 674 (9th Cir. 1992). Further, the gun was of no apparent exculpatory value. *See California v. Trombetta*, 467 U.S. 479, 489 (1984). Accordingly, a motion to dismiss would have been unavailing.

To establish a Fifth Amendment violation predicated upon pre-indictment delay, Koonin must show he suffered "actual, non-speculative prejudice from the delay and that the delay, when weighed against the government's reasons for it, offends those fundamental conceptions of justice which lie at the base of our civil and political institutions." *United States v. Gregory*, 322 F.3d 1157, 1165 (9th Cir. 2003) (citation omitted). Koonin did not meet this burden.

Defense counsel's decision to stipulate to the admission of the videotaped depositions at Koonin's trial was a reasonable one. The prosecution was thus deprived of an alleged delay tactic and portions of the testimony were helpful to the defense. Furthermore, Koonin agreed to use of the videotaped testimony after his counsel expressly informed him that he had the right to confront and cross-examine these witnesses.

The legal tactics challenged by Koonin all represent reasoned, strategic decisions by his counsel, and thus Koonin's ineffective assistance claim must fail. *See*

Strickland v. Washington, 466 U.S. 668, 691 (1984).

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
AUG 31 2004
CATHY A. CATTERSON,
CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,	:
	: No. 02-50350
Plaintiff - Appellee,	:
	: D.C. No. CR-96-
v.	: 01442-NAJ
	: Southern District of
ALFRED J. KOONIN,	: California, San Diego
	:
Defendant - Appellant.	: ORDER
	:

Before: NOONAN, TALLMAN, and RAWLINSON, Circuit Judges.

The panel has voted to deny Defendant Alfred Koonin's Petition for Rehearing. Judges Tallman and Rawlinson voted, and Judge Noonan recommended to reject the Suggestion for Rehearing En Banc.

The full court has been advised of the Suggestion For Rehearing En Banc, and no judge of the court has requested a vote.

The petition for rehearing filed August 5, 2004, is **DENIED** and the suggestion for rehearing en banc is **REJECTED**.

Supreme Court of the United States
Alfred J. KOONIN, petitioner,
v.
UNITED STATES.
No. 04-711.

March 28, 2005.

Case below, 361 F.3d 1250.

On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
Oct 03 2005
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ALFRED J. KOONIN,

Defendant - Appellant.

No. 02-50350
D.C. No. CR-96-01442-NAJ
Southern District of California, San Diego

ORDER

Before: NOONAN, TALLMAN, and RAWLINSON, Circuit Judges.

This case is remanded to the district court for consideration of the sentence imposed as outlined in *United States v. Ameline*, 409 F.3d 1073, 1083 (9th Cir. 2005) (en banc).

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
DEC 5 2005
Clerk, U.S. District Court
Southern District of California
By B. Reed

UNITED STATES OF AMERICA,	:
	: No. 02-50350
Plaintiff - Appellee,	:
	: D.C. No. CR-96
v.	: 01442-NAJ
	:
ALFRED J. KOONIN,	:
	:
Defendant - Appellant.	: JUDGMENT
	:

Appeal from the United States District court for the Southern District of California (San Diego).

This cause came on to be heard on the Transcript of the Record from the United States for the Southern District of California (San Diego) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District court in this cause be, and hereby is.

REMANDED.

Filed and entered October 3, 2005

A true Copy
Cathy A. Catterson
Clerk of the Court
ATTEST
OCT 25, 2005

by: /s/
Deputy Clerk
Entered on 12/7/05

AND THAT'S A LITTLE COMPASSION.

THE COURT: I BELIEVE THE COURT SPREAD THE MANDATE AT THE LAST HEARING. IF NOT, THE COURT WILL SPREAD THE MANDATE AT THIS TIME.

MR. HARRIGAN: NOTHING FURTHER.

THE COURT: THE COURT HAS REVIEWED THE PRESENTENCE REPPORT. OBVIOUSLY, THE KEY FACTORS ARE THOSE FACTS THAT WERE PRESENTED TO THE COURT AT THE TIME OF THE ORIGINAL SENTENCE, UNDERSTANDING NOW THAT THOSE GUIDELINES ARE ADVISORY ONLY, WHETHER OR NOT THERE WOULD BE A MATERIAL DIFFERENCE IN THE SENTENCE IMPOSED BY THE COURT.

THE REALITY IS THAT THE FACTORS POINTED OUT IN A MEMO PREPARED BY MR. BRANTON BASICALLY ECHO THE ARGUMENTS AND FACTORS PRESENTED TO THE COURT AT THE TIME OF THE ORIGINAL SENTENCING IN THIS MATTER.

THE COURT IS STILL IMPRESSED WITH THE PRESENTING FACTS IN THAT CASE. HAVING REVIEWED ALL, THE COURT IS SATISFIED AND CONFIDENT THAT, CONSIDERING THE 3553(A) FACTORS, THE SENTENCE IMPOSED BY THE COURT WOULD NOT BE MATERIALLY DIFFERENT, AND THE COURT WILL REAFFIRM THE SENTENCE PREVIOUSLY IMPOSED.

MR. BRANTON: MAY I ASK YOUR HONOR TO

ORDER THE COURT REPORTER TO PREPARE THE TRANSCRIPT?

THE REPORTER: HE WILL NEED TO SUBMIT A C.J.A. REQUEST.

Minutes of the United States District Court
Southern District of California
Monday, December 5, 2005
1996CR01442-J

For the Honorable: Napoleon A. Jones, Jr.
District Judge

Deputy Clerk: Bernadette Borja Court Reporter/ECR: Joan King

On Calendar:

1996CR01442-J

USA vs.	Lang Booking #
	ENG 76477198
(3) ALFRED J. KOONIN (C)	(3) Leon Branton, Jr RET
	323 732-6808
	Shane P. Harrigan
AUSA	
	619 557-5610

STATUS HRG (3)

Minutes:
APPEAL MANDATE HEARING HELD.
CERTIFIED COPY OF THE JUDGMENT FROM THE USCA REMANDING THE DECISION OF THE US DISTRICT COURT-ORDERED FILED AND ENTERED
STATUS HEARING HELD
COURT AFFIRMS SENTENCING PREVIOUSLY IMPOSED

United States Court of Appeals, Ninth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Alfred J. **KOONIN**, Defendant-Appellant.
No. 05-50977.

Submitted July 9, 2007*

Filed July 11, 2007.

Lawrence E. Spong, Esq., Office of the U.S. Attorney, San Diego, CA, for Plaintiff-Appellee.
Leo Branton, Jr., Esq., Los Angeles, CA, for Defendant-Appellant.

Appeal from the United States District Court for the Southern District of California, Napoleon A. Jones, District Judge, Presiding. D.C. No. CR-96-01442-NAJ.

Before: BRIGHT**, BEA, and IKUTA, Circuit Judges.

MEMORANDUM***

**1 Alfred J. Koonin appeals the district court's judgment following a limited remand pursuant to

---

* This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R.App. P. 34(a)(2).

** The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

*** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

United States v. Ameline, 409 F.3d 1073 (9th Cir.2005) (en banc). We affirm.

Koonin first argues that his original sentence was vacated by the Supreme Court, and that accordingly, on remand, the district court resentenced him *in absentia*. We reject this argument. The Supreme Court did not disturb Koonin's original sentence.

Koonin's remaining arguments are foreclosed by our recent decisions in *United States v. Combs*, 470 F.3d 1294 (9th Cir.2006) and *United States v. Silva*, 472 F.3d 683 (9th Cir.2007). First, Koonin had no right to be present at the first phase of the *Ameline* remand procedure. *Silva*, 472 F.3d at 686. Second, the district court provided an appropriate explanation for its decision not to resentence Koonin. *See Combs*, 470 F.3d at 1296-97. Finally, given the procedural posture of this case, Koonin's challenge to the reasonableness of his overall sentence is not properly before us. *Id.*[1]

AFFIRMED.

---

[1] In making this determination, we note that at no time during his first appeal to this court did Koonin challenge the reasonableness of his sentence. *See Combs*, 470 F.3d at 1295.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
SEP 14 2007
CATHY A. CATTERSON,
CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,	:
	: No. 05-50977
Plaintiff - Appellee,	:
	: D.C. No. CR-96-
v.	: 01442-NAJ
	: Southern District of
ALFRED J. KOONIN,	: California, San Diego
	:
Defendant - Appellant.	: ORDER
	:

Before: BRIGHT,* BEA, and IKUTA, Circuit Judges.

The panel has voted to deny Appellant's Petition for Rehearing. Judge Bright has recommended denying Appellant's Petition for Rehearing En Banc, Judges Bea and Ikuta have voted to deny the en banc petition. The panel has also voted to deny Appellant's Petition to File Amendment to Recall of Mandate Motion.

* The Honorable Myron H. Bright, Senior United States Circuit for the Eighth circuit, sitting by designation.

The full court has been advised of the Petition for Rehearing En Banc and no Judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The Petition for Rehearing, Petition for Rehearing En Banc, and Petition to File Amendment to Recall of Mandate Motion are DENIED.